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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12
13 AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
14 SOUTHERN CALIFORNIA,

15 *Plaintiff,*

16 v.

17 UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT,
18 UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
19

20 *Defendants.*

Case No. 2:22-CV-04760-SHK

**PLAINTIFF'S AMENDED NOTICE
OF MOTION AND MOTION FOR
SUMMARY JUDGMENT AGAINST
DEFENDANTS DEPARTMENT OF
HOMELAND SECURITY AND
DEPARTMENT OF HOMELAND
SECURITY – OFFICE OF
INSPECTOR GENERAL**

Honorable Shashi H. Kewalramani
United States Magistrate Judge

Hearing Date: April 24, 2024
Time: 10:00 a.m.
Place: 3470 12th St., Riverside, CA
92501, Courtroom 3 or 4

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO DEFENDANTS AND COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on April 24, 2024, at 10:00 a.m., or as soon thereafter as the parties may be heard, in the courtroom of the Honorable Shashi H. Kewalramani, located at 3470 12th St., Riverside, CA 92501, Courtroom 3 or 4, or virtually, Plaintiff American Civil Liberties Union of Southern California (“ACLU-So Cal”) will bring a hearing for summary judgment pursuant to Federal Rule of Civil Procedure 56 in this Freedom of Information Act (“FOIA”) action on the ground that Defendants Department of Homeland Security (“DHS”) and DHS Office of Inspector General (“DHS-OIG”) are unlawfully withholding agency documents, and/or have conducted an inadequate search.

More particularly, Plaintiff seeks an order requiring Defendants DHS and DHS-OIG to (i) conduct a reasonable search responsive to Plaintiff’s requests under FOIA, 5 U.S.C. § 552, and/or (ii) produce (or reproduce) responsive documents without improper redactions in legible form.

The grounds for this motion are that there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law on its First and Second Causes of Action as to Defendant DHS-OIG. This motion is based on this notice of motion and motion, the attached memorandum of points and authorities, the Plaintiff’s statement of uncontroverted facts, the declarations of Laboni Hoq and Eunice Cho, the pleadings and papers filed in this action, and such oral argument and evidence as may be presented at the hearing on the motion.

This motion is made pursuant to the conference of counsel pursuant to L.R. 7-3, which took place on December 14, 2023, and February 20, 2024, and the scheduling order issued by Magistrate Judge Hon. Shashi H. Kewalramani on December 21, 2023, ECF No. 64.

1 Dated: February 28, 2023

Respectfully submitted,

2 /s/ Laboni Hoq

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27 *ACLU of Southern California v. U.S. ICE, et al.,*

28 Case No. 2:22-CV-04760-SHK

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This Freedom of Information Act (“FOIA”) lawsuit concerns Immigration and Customs Enforcement’s (“ICE”) practice of releasing from custody detained immigrants facing imminent death, a practice that allows the agency to evade public reporting of these deaths and avoid accountability for dangerous detention conditions and inadequate medical care. Because the public has a vital interest in understanding this practice, the American Civil Liberties Union Foundation of Southern California (“ACLU So-Cal” or “Plaintiff”) submitted a FOIA request to ICE, Department of Homeland Security’s (“DHS”) Privacy Office, and DHS’s Office of Inspector General (“DHS-OIG”) (collectively “Defendants”). Plaintiff filed this lawsuit after the agencies failed to respond as FOIA requires.

Since then, DHS-OIG has produced some records in response. However, DHS-OIG has withheld significant information based on unjustified exemptions, including details regarding cause of death listed on death certificates, medical treatment provided by ICE detention facilities, immigration case communications, and justifications for deathbed releases. DHS-OIG has also withheld documents related to its investigation of the deaths of Teka Gulema and Johana Medina-Leon¹ that shed important light on the agency’s internal accountability and oversight practices, and has failed to adequately search for records related to Martin Vargas Arrellano. Defendant DHS, including its component Office of Civil Rights and Civil Liberties (“CRCL”), has failed to conduct any search at all, despite clear indication that they likely have responsive records.

Defendant DHS-OIG has failed to justify its withholdings under FOIA Exemptions 5, 6, and 7(C), and DHS and DHS-OIG have failed to establish the

¹ Johana Medina-Leon was transgender, and Plaintiff refers to her with her chosen name.

adequacy of its search for responsive records. The Court should grant Plaintiff's motion for summary judgment.

II. BACKGROUND

A. ICE Releases People Facing Imminent Death from Detention Custody, Avoiding Accountability and Public Reporting Requirements.

Each day, ICE detains over 35,000 people in detention facilities nationwide.² ICE claims that it “prioritizes the health, safety, and well-being of all noncitizens in its custody,” and that “any death that occurs in ICE custody is a significant cause for concern.”³ But ICE has engaged in a disturbing practice: releasing detained immigrants nearing death from custody, allowing the agency to avoid public reporting and accountability requirements. Unfortunately, this is not new: In 2009, ICE admitted that it had omitted one in 10 deaths of detained immigrants from a list it had submitted to Congress, and that ICE had also discharged detainees shortly before they died, reducing the number of reported deaths.⁴ ICE's failure to account for these hidden deaths in recent years has taken on heightened importance in light of the record number of detainee deaths reported in 2020,⁵ and the likely undercount of detained immigrants who died during the COVID-19 pandemic.⁶

² *Immigration Detention Quick Facts*, Transnational Records Access Clearinghouse, <https://trac.syr.edu/immigration/quickfacts/detention.html> (last visited Feb. 19, 2024).

³ *Detainee Death Reporting*, ICE, Feb. 5, 2024, <https://www.ice.gov/detain/detainee-death-reporting>.

⁴ Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. Times, Jan. 9, 2010, <https://www.nytimes.com/2010/01/10/us/10detain.html>.

⁵ Catherine Schoichet, *The Death Toll in ICE Custody Is the Highest It's Been in 15 Years*, CNN, Sept. 20, 2020, <https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html>.

⁶ Dan Glaun, *How ICE Data Undercounts COVID-19 Victims*, PBS Frontline, Aug. 11, 2020, <https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/>.

1 Martin Vargas Arellano was a class member in a case challenging ICE's failure
 2 to protect detainees from COVID-19 at ICE's Adelanto Detention Center. As part of
 3 this case, ICE was required to report deaths at the facility to class counsel and the
 4 court. Nonetheless, when he died after contracting COVID in detention, ICE chose
 5 not to report it, on the basis that it had released him from custody before his death.
 6 Order at 1, *Hernandez Roman v. Wolf*, No. CV-20-00768-TJH, ECF No. 1031 (C.D.
 7 Cal. Mar. 20, 2021). The court found that ICE "actively conceal[ed]" this death,
 8 raising "significant concerns regarding the Government's actions and lack of
 9 candor." *Id.*

10 Jose Ibarra Bucio died from a brain hemorrhage he suffered at the Adelanto
 11 Detention Center. ICE never reported his death. ICE's excuse was that it had released
 12 Mr. Ibarra Bucio while he was in a coma, so it had no reporting obligation.⁷

13 Johana Medina-Leon, a nurse, recognized that her worsening chest pain in ICE
 14 custody was a serious warning sign. She asked for an HIV test, received a positive
 15 result, and was sent to the hospital.⁸ Within days, she passed away. ICE did not report
 16 her death, claiming that it "released" her the same day it sent her to the hospital.⁹

21 ⁷ Amy Taxin, *Family Seeks Answers in Immigrant's Death After Detention*, AP
 22 News, Apr. 10, 2019,
 23 <https://apnews.com/article/8775303f79ee4d44a5959c34a8f3d99d>.

24 ⁸ Adolfo Flores, *A Transgender Woman Died After Being Held for Weeks in ICE*
 25 *Custody*, BuzzFeed News, Jun. 3, 2019,
 26 <https://www.buzzfeednews.com/article/adolfoflores/transgender-woman-dies-ice-custody-asylum>.

27 ⁹ Sam Levin, *Trans Woman Who Died after Illness in U.S. Custody Had Asked to Be*
 28 *Deported, Family Says*, The Guardian, Jun. 12, 2019,
 29 <https://www.theguardian.com/us-news/2019/jun/12/trans-woman-death-us-custody-ice-deportation>.

1 When asked about her death, ICE officials told reporters that she had died after
2 testing positive for HIV.¹⁰

3 Teka Gulema suffered an infection while in ICE custody that left him
4 paralyzed.¹¹ He eventually fell into a coma-like state and died shortly thereafter. ICE
5 did not report this death because it had released him from custody shortly before he
6 died.¹²

7 Plaintiff brought this case to shed light on these, and other, unknown and
8 unreported deaths, in support of its advocacy on behalf of detained immigrants and
9 their families.

10 **B. Plaintiff's FOIA Request and Procedural Background**

11 Plaintiff submitted its FOIA request ("Request") to ICE, DHS's Privacy
12 Office, and DHS-OIG on April 29, 2022. After they failed to timely produce
13 responsive records, Plaintiff filed this lawsuit on July 12, 2022 against ICE and DHS,
14 Compl., ECF No. 1-1, and added DHS-OIG as a Defendant on October 4, 2022, Am.
15 Compl., ECF No. 24. On February 9, 2023, this Court ordered Defendants to produce
16 records to Plaintiff monthly with updated search information, and thereafter provide

17 ¹⁰ Daniel Borunda, *Transgender Asylum Seeker from El Salvador Held by ICE Dies*
18 *at El Paso Hospital*, El Paso Times, Jun. 3, 2019,

19 [https://www.elpasotimes.com/story/news/immigration/2019/06/03/transgender-](https://www.elpasotimes.com/story/news/immigration/2019/06/03/transgender-migrant-johana-medina-leon-dies-el-paso-hospital/1332236001/)
20 [migrant-johana-medina-leon-dies-el-paso-hospital/1332236001/](https://www.elpasotimes.com/story/news/immigration/2019/06/03/transgender-migrant-johana-medina-leon-dies-el-paso-hospital/1332236001/); Robert Moore,
21 *Transgender Woman Who Had Been in ICE Custody Dies After Falling Ill*,
22 Washington Post, Jun. 2, 2019,
23 [https://www.washingtonpost.com/immigration/transgender-woman-migrant-who-](https://www.washingtonpost.com/immigration/transgender-woman-migrant-who-had-been-in-ice-custody-dies-after-falling-ill/2019/06/02/d194528a-85a6-11e9-98c1-e945ae5db8fb_story.html)
24 [had-been-in-ice-custody-dies-after-falling-ill/2019/06/02/d194528a-85a6-11e9-](https://www.washingtonpost.com/immigration/transgender-woman-migrant-who-had-been-in-ice-custody-dies-after-falling-ill/2019/06/02/d194528a-85a6-11e9-98c1-e945ae5db8fb_story.html)
25 [98c1-e945ae5db8fb_story.html](https://www.washingtonpost.com/immigration/transgender-woman-migrant-who-had-been-in-ice-custody-dies-after-falling-ill/2019/06/02/d194528a-85a6-11e9-98c1-e945ae5db8fb_story.html).

26 ¹¹ William Thornton, "One Who Could Have Been You": Group Protests Former
27 *Detainee's Death*, Advance Local, Feb. 28, 2016 (updated Jan. 13, 2019),
28 [https://www.al.com/news/anniston-](https://www.al.com/news/anniston-gadsden/2016/02/one_who_could_have_been_you_gr.html)
29 [gadsden/2016/02/one_who_could_have_been_you_gr.html](https://www.al.com/news/anniston-gadsden/2016/02/one_who_could_have_been_you_gr.html).

30 ¹² Complaint from CIVIC to John Roth, Inspector General, DHS, et al., 3, Mar. 31,
31 2016, [http://www.endisolation.org/blog/wp-content/uploads/2016/02/Complaint-](http://www.endisolation.org/blog/wp-content/uploads/2016/02/Complaint-Etowah-Medical_1.pdf)
32 [Etowah-Medical_1.pdf](http://www.endisolation.org/blog/wp-content/uploads/2016/02/Complaint-Etowah-Medical_1.pdf).

1 a *Vaughn* Index to justify any withholding of responsive records. Order, ECF No. 40.
 2 Defendant DHS-OIG has now completed its production of records, and has provided
 3 Plaintiff a *Vaughn* Index and a letter summarizing its search. Declaration of Laboni
 4 Hoq (“Hoq Decl.”), Ex. Y (*Vaughn* Index); Ex. R (search summary).¹³ Defendant
 5 DHS has not searched its component, Office of Civil Rights and Civil Liberties
 6 (“CRCL”), despite concrete indication that it likely has responsive records.¹⁴ DHS
 7 and DHS-OIG have failed to meet their obligations. The Court should grant summary
 8 judgment in Plaintiff’s favor.

9 C. DHS-OIG Withholdings at Issue

10 Plaintiff seeks to challenge a limited set of redactions and withholdings in
 11 DHS-OIG’s productions, as follows.¹⁵

- 12 1. Withholding of draft Reports of Investigation (“ROI”) and Memoranda of
 13 Activity (“MOA”) regarding the deaths of Gulema and Medina-Leon.
 14 Plaintiff challenges DHS-OIG’s use of Exemption 5 to withhold these
 15 documents.
- 16 2. Redaction of DHS-OIG’s ROIs and draft media statements related to
 17 Medina-Leon’s death, including diagnostic questions and medical tests by
 18 ICE detention medical staff prior to her release from custody, and the cause
 19 of death listed on her death certificate.¹⁶ Plaintiff challenges DHS-OIG’s use
 20 of Exemptions 6 and 7(c) to withhold these documents.

21 ¹³ Citations to declaration exhibits reference page numbers within each exhibit.

22 ¹⁴ Plaintiff’s Statement of Uncontroverted Facts provides a detailed summary of the
 23 procedural history and Defendants’ production.

24 ¹⁵ In declining to further challenge certain redactions and withholdings, Plaintiff
 does not imply they were appropriate under FOIA.

25 ¹⁶ Ms. Medina-Leon’s death certificate will not be publicly available until 25 years
 26 after her death. See Texas Dep’t of State Health Servs., *Death Record FAQs*,
 27 <https://www.dshs.texas.gov/vital-statistics/death-records/death-record-faqs#:~:text=Death%20certificates%20are%20not%20open,you%20are%20a%20qualified%20applicant.>

3. Redaction of DHS-OIG ROIs and MOAs, which ICE describes as “immigration information” related to Gulema and Medina-Leon. This information appears to be statements made by ICE officers assigned to Medina-Leon regarding ICE’s decision to release her from custody, information related to Medina-Leon’s entry to the United States, and ICE’s attempts to obtain travel documents to deport Gulema. Plaintiff challenges DHS-OIG’s use of Exemptions 6 and 7(c) to withhold these documents.¹⁷

4. Withholding of documents reviewed by DHS-OIG in its investigations, including attachments to MOAs and ROIs, which DHS-OIG referred to ICE for production. These documents include records documents and emails regarding Gulema’s release from custody dated after October 1, 2015. DHS-OIG has claimed to have completed its production, and ICE has claimed to have completed its production of documents related to Gulema dated after October 1, 2015, but neither has produced these documents. Plaintiff challenges DHS-OIG’s withholding of referred documents.

A copy and appendix of documents with challenged redactions are available at Exhibits A and B of the Declaration of Eunice Cho (“Cho Declaration”).

D. DHS and DHS-OIG's Inadequate Search

Plaintiff challenges DHS-OIG’s failure to search for records related to a Case Summary Report related to Vargas Arellano. DHS-OIG failed to search correspondence regarding its decision to open and close that case, and documents associated with the case numbers referenced in the Report. Although Plaintiff identified records showing that a search of additional DHS components was warranted, DHS refused to do so.

¹⁷ DHS-OIG previously claimed Exemption 3 for these documents on the basis of an “unspecified statute,” but has since withdrawn that justification. *See* Hoq Decl. Y at 1 n.1.

III. ARGUMENT

A. LEGAL STANDARD

Congress enacted FOIA to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Muchnick v. Dep’t of Homeland Sec.*, 225 F. Supp. 3d 1069, 1072 (N.D. Cal. 2016) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). “The Supreme Court has observed that “[w]ithout question, [FOIA] is broadly conceived” and is animated by a “philosophy of full agency disclosure.” *Id.* at 151 (citations omitted). “Liberal construction is warranted to achieve the core purpose of FOIA: allowing the public to find out what their government is up to.” *Yagman v. Pompeo*, 868 F.3d 1075, 1080 (9th Cir. 2017) (citation omitted). FOIA therefore sets a “strong presumption in favor of disclosure.” *Ray*, 502 U.S. at 173.

“Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved.” *Nat’l Res. Def. Council v. Dep’t of Def.*, 388 F. Supp. 2d 1086, 1094 (C.D. Cal. 2005) (citation omitted). The underlying facts and possible inferences are construed in favor of the FOIA requester. *Id.* at 1095 (citation omitted).

B. DHS-OIG Improperly Withheld Information Not Justified by FOIA Exemptions.

Where an agency locates a responsive document but withholds it under an exemption, the agency bears the burden to prove that the claimed exemption applies. “An agency may withhold a document only if the information contained in the document comes under one of the nine exemptions listed in § 552(b), which exemptions are to be construed narrowly.” *Powell v. Dep’t of Justice*, 584 F. Supp. 1508, 1512 (N.D. Cal. 1984). Courts should narrowly construe the exemptions in light of FOIA’s preference for “disclosure over secrecy.” *TPS, Inc. v. Dep’t of Def.*, 330 F.3d 1191, 1196 (9th Cir. 2003). Doubts must be “resolved in favor of

1 disclosure.” *Bloomberg, L.P. v. Bd. of Governors*, 601 F.3d 143, 147 (2d Cir. 2010)
2 (citation omitted).

3 Because requestors necessarily face a disadvantage in arguing for disclosure
4 where the agency withholds responsive documents, the government typically must
5 both supply a declaration and a *Vaughn* index that identifies each document and
6 explains their reason for withholding it. *See Wiener v. F.B.I.*, 943 F.2d 972, 977 (9th
7 Cir. 1991). Agency affidavits should not “merely recit[e] statutory standards,” be
8 “too vague or sweeping,” *Hayden v. Nat’l Sec. Agency*, 608 F.2d 1381, 1387 (D.C.
9 Cir. 1979), or be “controverted by ... contrary evidence in the record.” *Miller v.*
10 *Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984).

11 Even where an agency properly withholds information within a record, it must
12 disclose any “reasonably segregable” portions. 5 U.S.C. § 552(b); *Powell*, 584 F.
13 Supp. at 1512 (“§ 552(b) specifically provides that any reasonably segregable portion
14 of a record shall be provided to any person requesting such record after deletion of
15 the portions which are exempt”) (citations and alterations omitted). If an agency
16 withholds a document in full, it bears the burden to demonstrate that no reasonably
17 segregable information exists within the documents withheld. *Pac. Fisheries, Inc. v.*
18 *United States*, 539 F.3d 1143, 1148 (9th Cir. 2008). The Court may not “simply
19 approve the withholding of an entire document without entering a finding on
20 segregability.” *Church of Scientology v. Dep’t of Army*, 611 F.2d 738, 744 (9th Cir.
21 1979).

22 Where a defendant’s *Vaughn* index and declarations fail to provide sufficient
23 information to resolve the dispute over disclosure, FOIA authorizes *in camera* review
24 to determine whether documents have been properly withheld. 5 U.S.C. §
25 552(a)(4)(B). The court has broad discretion to conduct this review even where
26 defendants’ affidavits appear sufficient on their face. “The ultimate criterion is
27 simply this: Whether the district judge believes that in camera inspection is needed

1 in order to make a responsible de novo determination on the claims of exemption.”
 2 *Ray v. Turner*, 587 F.2d at 1195. The court may conduct *in camera* review merely
 3 “on the basis of an uneasiness, on a doubt he wants satisfied before he takes
 4 responsibility for a de novo determination,” because an agency’s decision to withhold
 5 documents may simply “reflect an inherent tendency to resist disclosure, and judges
 6 may take this natural inclination into account.” *Id.*

7 **1. DHS-OIG Improperly Withheld Information Under FOIA**
 8 **Exemption 5.**

9 Under Exemption 5, the government may withhold “inter-agency or intra-
 10 agency memorandums or letters that would not be available by law to a party other
 11 than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). “To properly
 12 assert this privilege, an agency must show that a document is both ‘(1)
 13 “predecisional” or “antecedent to the adoption of agency policy” and (2)
 14 “deliberative,” meaning “it must actually be related to the process by which policies
 15 are formulated.”’” *Transgender Law Ctr. v. Immigr. and Customs Enf’t*, 46 F.4th
 16 771, 783 (9th Cir. 2022) (citation omitted). “Simply designating a document as a
 17 ‘draft’ does not automatically make it privileged under the deliberative process
 18 privilege.” *Transgender Law Ctr*, 46 F.4th 771 (citation omitted). Exemption 5 “does
 19 not protect a document which is merely peripheral to actual policy formation; the
 20 record must bear on the formulation or exercise of policy-oriented judgment.”
 21 *Habeas Corpus Res. Ctr. v. Dep’t of Justice*, No. C08–2649, 2008 WL 5000224, at
 22 *1 (N.D. Cal. 2008) (citation omitted). And “[p]urely factual material that does not
 23 reflect deliberative processes is not protected” at all. *F.T.C. v. Warner Commc’ns*
 24 *Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citing *Env’t Prot. Agency v. Mink*, 410
 25 U.S. 73, 88 (1973)).

1 Defendants withheld 367 pages of documents in full under Exemption 5.¹⁸ In
 2 their *Vaughn* Index, Defendants identify the withheld documents as “draft
 3 Memorandums of Activity” that are “enclosures to DHS OIG’s Report of
 4 Investigations,” regarding Gulema and Medina-Leon. Hoq Decl. Ex. Y at 24, 26, and
 5 28 (*Vaughn* Entries 20, 21, 22).

6 Defendants, however, have not met their burden of demonstrating that these
 7 records are deliberative or predecisional. In *Transgender Law Center*, the Ninth
 8 Circuit considered whether ICE had met its burden to demonstrate that draft mortality
 9 reports—like here, investigatory reports into the deaths of detained immigrants—
 10 were protected under Exemption 5. The Ninth Circuit concluded that it did not, as its
 11 *Vaughn* index “contain[ed] *no* references to any decision to which the document
 12 pertains.” 46 F.4th at 783 (emphasis in original). A close examination of DHS-OIG’s
 13 *Vaughn* index regarding the agency’s draft Reports of Investigation and
 14 Memorandums of Activity reveals the same. Hoq Decl. Ex. Y at 24, 26, and 28
 15 (*Vaughn* Entries 20, 21, 22). Although Defendants’ *Vaughn* index recites a summary
 16 of the deliberative process privilege, Defendants do not ever meaningfully reference
 17 any decision or policy process to which the withheld information applies. *See Cal.*
 18 *Native Plant Soc’y v. U.S. E.P.A.*, 251 F.R.D. 408, 413 (N.D. Cal 2008) (citation
 19 omitted) (an “index of documents providing just basic information and a brief
 20 description is inadequate”). For this reason, the Court should order the complete
 21 release of the draft documents.

22 Moreover, even if the government can demonstrate that a record contains *some*
 23 predecisional and deliberative material, that does not render the entire record exempt.
 24 “Factual portions of documents covered by the deliberative process privilege must
 25 be segregated and disclosed unless they are ‘so interwoven with the deliberative
 26 material that they are not segregable.’” *Pacific Fisheries, Inc. v. U.S.* 539 F.3d 1143,

27 ¹⁸ See Proposed Order at 1 for list of withheld documents.

28 *ACLU of Southern California v. U.S. ICE, et al.*, Case No. 2:22-CV-04760-SHK
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1 1148 (9th Cir. 2008) (citation omitted). The burden is on the government to establish
 2 that all reasonably segregable portions have been segregated and disclosed. 5 U.S.C.
 3 § 552(a)(4)(B), (b). To the extent that any of the records contain predecisional and
 4 deliberative material, Defendants’ wholesale withholding of these draft documents,
 5 without consideration of its duty to segregate and disclose factual information, is
 6 improper. In that instance, the Court should order that the DHS-OIG produce a
 7 redacted version, with a *Vaughn* index that provides specific information about each
 8 redaction.

9 **2. DHS-OIG Improperly Withheld Information Under FOIA** 10 **Exemption 6 and 7(c).**

11 Defendants assert FOIA Exemptions 6 and 7(c) to withhold supposedly private
 12 information involving Medina-Leon and Gulema. The redacted information appears
 13 to include an official cause of death on Medina-Leon's death certificate, diagnostic
 14 questions and medical tests conducted by ICE detention medical staff prior to her
 15 release from custody, statements describing ICE’s decision to release her from
 16 custody, and information related to her initial entry to the United States. ICE has also
 17 redacted information apparently related to ICE’s attempts to obtain travel documents
 18 to deport Gulema. The public interest in disclosure of this information greatly
 19 outweighs the diminished privacy interests, given the need for transparency into
 20 potential failures of medical care contributing to the deaths of detained immigrants,
 21 and ICE’s ability to reduce the number of reported deaths by releasing people facing
 22 imminent death from custody.

23 **a. The Legal Standard Under Exemptions 6 and 7(c).**

24 Under Exemption 6, an agency may withhold “personnel and medical files and
 25 similar files the disclosure of which would constitute a clearly unwarranted invasion
 26 of personal privacy.” 5 U.S.C. § 552(6). Under Exemption 7(c), an agency may
 27 withhold “records or information compiled for law enforcement purposes, but only

1 to the extent” that production “could reasonably be expected to constitute an invasion
 2 of personal privacy.” Exemption 7(c) includes a threshold requirement that the
 3 records were “compiled for law enforcement purposes”; Exemption 6 does not.
 4 *Compare* 5 U.S.C. § 552(b)(7) *with* 5 U.S.C. § 552(b)(6). Other than this threshold
 5 requirement, Exemptions 6 and 7(c) involve similar analyses that “require balancing
 6 the public interest [in disclosure] with ‘personal privacy.’” *Yonemoto v. Dep’t of*
 7 *Veterans Affs.*, 686 F.3d 681, 693 n.7 (9th Cir. 2012) (citing 5 U.S.C. § 552(b)(7)(C)),
 8 *overruled on unrelated grounds by Animal Legal Def. Fund v. U.S. Food & Drug*
 9 *Admin.*, 836 F.3d 987 (9th Cir. 2016). For that reason, “cases interpreting the interest
 10 in ‘personal privacy’ with regard to one of the two exemptions are useful in the
 11 context of the other,” and Plaintiff applies these parallel analyses together. *Id.*

12 Both the Exemption 6 and Exemption 7(c) analyses begin by determining
 13 whether “disclosure implicates a personal privacy interest that is ‘nontrivial,’ or, put
 14 differently, ‘more than de minimis.’” *Yonemoto*, 686 F.3d at 693 (Exemption 6
 15 analysis (citations omitted)); *accord Nat’l Archives & Recs. Admin. v. Favish*, 541
 16 U.S. 172 (2004) (Exemption 7(c)). If the government can point to a non-trivial
 17 privacy interest, both the Exemption 6 and Exemption 7(c) analyses then move to a
 18 second step. “At step two [courts] employ a balancing approach: [They] place the
 19 privacy interests identified at the first step on one end of the balance, and the public
 20 interest favoring disclosure on the other.” *Yonemoto*, 686 F.3d at 693; *accord Favish*,
 21 541 U.S. at 172 (Exemption 7(c)). The public interest asserted by the requestor must
 22 involve “the extent to which disclosure of the information sought would shed light
 23 on an agency’s performance of its statutory duties or otherwise let citizens know what
 24 their government is up to.” *Yonemoto*, 686 F.3d at 694 (quotation marks and citation
 25 omitted).

26 **b. Defendants Fail the Threshold Requirement for**
 27 **Exemption 7(c) to Show Law Enforcement Purposes.**

1 Defendants fail the threshold requirement for Exemption 7(c) that the records
 2 were “compiled for law enforcement purposes.” 5 U.S.C. § 552(b)(7); *see also*
 3 *Rosenfeld v. U.S. Dep’t of Just.*, No. C07-3240-MHP, 2010 WL 3448517, at *9 (N.D.
 4 Cal. Sept. 1, 2010). Although an agency whose sole function is law enforcement may
 5 be entitled to some deference, “a mixed-function agency” involved in activities
 6 beyond law enforcement is “subject to an exacting standard when it comes to the
 7 threshold requirement of Exemption 7.” *Tax Analysts v. I.R.S.*, 294 F.3d 71, 77 (D.C.
 8 Cir. 2002).

9 DHS-OIG is a mixed-function agency that must meet this more exacting
 10 standard. DHS-OIG itself describes its responsibilities as mixed in function,
 11 including law enforcement investigations that could result in prosecution and
 12 investigations that could result in personnel actions.¹⁹ Like other OIG offices found
 13 to be a mixed-function agency, DHS-OIG’s responsibilities “embrace not only
 14 investigations of violations of law and breaches of professional standards that may
 15 result in civil liability, but also more routine investigations ... that may never result
 16 in civil or criminal referrals or proceedings.” *Scarlett v. Off. of Inspector Gen.*, No.
 17 CV 21-819, 2023 WL 2682259, at *7 (D.D.C. Mar. 29, 2023) (concluding that “the
 18 [National Science Foundation]’s OIG is a mixed-function agency”); *Jefferson v.*
 19 *Dep’t of Just.*, 284 F.3d 172, 179 (D.C. Cir. 2002) (same for Department of Justice’s
 20 Office of Professional Responsibility). As a mixed-function agency, DHS-OIG
 21 “bears the burden of showing on a case-by-case basis that any requested records were
 22 actually compiled for law-enforcement ... purposes.” *Bartko v. United States Dep’t*
 23 *of Just.*, 898 F.3d 51, 65 (D.C. Cir. 2018). It therefore must show that “the
 24 investigatory activity that gave rise to the documents is ‘related to the enforcement
 25

26 ¹⁹ DHS OIG, *Frequently Asked Questions: What Type of Work Does the Office of*
 27 *Investigations Conduct?*, <https://www.oig.dhs.gov/about/faqs> (last visited Feb. 20,
 28 2024).

1 of federal laws,’ and there is a rational nexus between the investigation at issue and
 2 the agency’s law enforcement duties.” *Jefferson*, 284 F.3d at 177 (citation omitted).

3 Defendants fall short. Their sole contention is boilerplate: “DHS OIG
 4 compiled this information for law enforcement purposes, i.e., the information,
 5 including the sensitive health information, was compiled within a completed DHS
 6 OIG report that stemmed from a law enforcement investigation.” Hoq Decl. Ex. Y at
 7 7. This justification fails to even attempt to distinguish between DHS-OIG’s law-
 8 enforcement role and its other roles or to show the required nexus between the
 9 investigation and law enforcement duties. The Court should reject Defendants’ 7(c)
 10 objections outright.

11 **c. Defendants Fail to Show Privacy Interests that**
 12 **Outweigh the Public Policy Interest in Disclosure.**
 13 **i. Defendants Cannot Justify Redacting Medina-**
 14 **Leon’s Widely Reported Health Information.**

15 Plaintiff challenges three categories of redactions involving Medina-Leon’s
 16 health information. First, Plaintiff challenges Defendants’ redaction of the third cause
 17 of death listed on Medina-Leon’s death certificate.²⁰ Second, Plaintiff challenges the
 18 redaction of the condition identified in a blood test taken by Medina-Leon and
 19 information about how she may have contracted it.²¹ Third, Plaintiff challenges DHS-
 20 OIG’s redaction of sample questions considered by its press office about its failure to
 21 screen Medina-Leon for this condition.²² Defendants assert Exemptions 6 and 7(c).

22 There is a limited privacy interest in the redacted information. As a general
 23 matter, “an individual who is deceased has greatly diminished personal privacy
 24 interests in the context of the FOIA.” *Wessler v. U.S. Dep’t of Justice*, 381 F. Supp.
 25 3d 253, 259 (S.D.N.Y. 2019). Although surviving family members have privacy

26 ²⁰ Cho Decl. Ex. A: November 2022, 37-38; December 2022: 92.

27 ²¹ *Id.*, November 2022: 15, 16, 20, 25-26, 33, 39, 41, 50; December 2022: 37, 41,
 28 44-45, 51, 55-56, 70-71, 76, 84, 97, 99; June 2023: 1.

²² *Id.*, March 2023: 49.

1 interests recognizable under FOIA, courts have only found that these interests extend
 2 specifically to a deceased's death-scene images, autopsy reports, and audio files of
 3 final moments. *See Huddleston v. Fed. Bureau of Investigation*, No. 4:20-CV-00447,
 4 2022 WL 4593084, at *23 (E.D. Tex. Sept. 29, 2022) (discussing cases).

5 Defendants' own disclosures to the public, moreover, have greatly diminished
 6 the privacy interest in question. "[W]hen an agency freely discloses to a third party
 7 confidential information covered by a FOIA exemption without limiting the third-
 8 party's ability to further disseminate the information then the agency waives the
 9 ability to claim an exemption to a FOIA request for the disclosed information."
 10 *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1198 (9th Cir.
 11 2011). Defendants themselves have disclosed the circumstances surrounding
 12 Medina-Leon's death to the media, including untreated HIV status that may have
 13 contributed to her death. Specifically, Defendants have redacted the third cause of
 14 death on Medina-Leon's death certificate—but apparently disclosed it to the Los
 15 Angeles Times in a separate FOIA request.²³ ICE officials themselves told national
 16 media outlets, including the *Washington Post*, that Medina-Leon was HIV-positive.²⁴
 17 With these facts surrounding her death already widely disclosed by Defendants, there
 18 is no privacy interest in shielding these facts here. *See Avondale Indus. v. NLRB*, 90
 19 F.3d 955, 961 (5th Cir. 1996) (holding that there is no privacy interest in information
 20 contained in "files [that] have long been available to any member of the public for
 21 inspection").

22
 23
 24 ²³ Andrea Castillo and Jie Jenny Zou, *ICE Rushed to Release a Sick Woman,*
 25 *Avoiding Responsibility for Her Death. She Isn't Alone*, LA Times, May 13, 2022,
 26 [https://www.latimes.com/world-nation/story/2022-05-13/ice-immigration-](https://www.latimes.com/world-nation/story/2022-05-13/ice-immigration-detention-deaths-sick-detainees)
 27 [detention-deaths-sick-detainees](https://www.latimes.com/world-nation/story/2022-05-13/ice-immigration-detention-deaths-sick-detainees) ("A death certificate listed sepsis ... as the primary
 28 cause of death, with pneumonia and HIV as underlying causes.").

²⁴ Moore, *supra* note 10 ("Earlier that day, she had requested an HIV test, which
 came back positive, [ICE] officials said.").

1 The disclosure of this information, in contrast, would significantly serve the
 2 public interest. Medina-Leon was not the first transgender woman detained by ICE
 3 to die with HIV that year.²⁵ ICE apparently did not screen Medina-Leon for HIV on
 4 intake, nor did it provide any HIV screening when she reported serious symptoms.²⁶
 5 The redactions at issue likely withhold information about ICE's failure to screen and
 6 treat Medina-Leon for HIV and the fact that it contributed to her death. This
 7 information will shed light on the ways in which ICE's screening systems of
 8 medically vulnerable detainees must be improved. For example, a DHS-OIG
 9 investigator looking into the circumstances of Medina-Leon's death noted that when
 10 she arrived in ICE custody, medical staff "checked 'Yes' to a question that asked
 11 Medina if she ever had a history of [redacted]." Cho Decl., Ex. A at Nov. 2022: 20.
 12 ICE's failure to screen someone for HIV whose records included this response is
 13 likely highly relevant to necessary reforms. The potential for unredacted versions of
 14 these records to bring about changes to protect others more than outweighs the
 15 diminished privacy interest here.

16 Defendants cannot justify these redactions, and the Court should order that the
 17 redactions be lifted. In the alternative, the Court should review these redactions *in*
 18 *camera* to weigh the public and private interests for the release of this information. 5
 19 U.S.C. §552(a)(4)(B).

20 **ii. Defendants Cannot Justify Redacting Medina-Leon**
 21 **and Gulema's Immigration Information.**

22 Plaintiff challenges the following redactions involving Medina-Leon and
 23 Gulema's immigration information: witness statements made by ICE officers related

24 _____
 25 ²⁵ Tim Fitzsimons, *Transgender ICE Detainee Died of AIDS Complications,*
 26 *Autopsy Shows*, NBC News, April 17, 2019,
 27 <https://www.nbcnews.com/feature/nbc-out/transgender-ice-detainee-died-aids-complications-autopsy-shows-n994836> (discussing death of Roxana Hernandez).

28 ²⁶ Castillo, *supra* n. 23.

1 to the decision to release Medina-Leon from custody,²⁷ information related to her
 2 entry to the United States,²⁸ and ICE's attempts to obtain travel documents to deport
 3 Gulema from the United States. Notably, these redactions cover only select
 4 immigration-related information in the responsive documents. For example,
 5 Defendants produced a summary of records "related to [Gulema's] dealings with
 6 immigration" that provides various elements of his immigration history, redacting
 7 only one line. Cho Decl., Ex. A at Jun. 2023: 0157. Defendants assert Exemptions 6
 8 and 7(c).²⁹

9 Defendants have failed to meet their burden to show any non-trivial personal
 10 privacy interest. Defendants offer limited information as to what these redactions
 11 address. Their *Vaughn* index provides only vague descriptions of the information
 12 redacted as "personal privacy immigration information" and "[p]ersonal privacy
 13 details pertaining to the subject's life and immigration history." Hoq. Decl. Ex. Y at
 14 9-11. These categorical, boilerplate descriptions fail to provide any meaningful clues
 15 that would allow Plaintiff or the court to evaluate the privacy interest of this
 16 information. See *Physicians for Human Rights v. U.S. Dep't of Defense*, 675 F.
 17 Supp.2d 149, 166 (D.C. Cir. 2009). Defendants' "vague or sweeping" descriptions
 18 cannot carry their burden to justify an exemption. *Hayden v. N.S.A.*, 608 F.2d 1381,
 19 1387 (D.C. Cir. 1979). Defendants therefore fail at the first step of the Exemption 6
 20

21 ²⁷ Cho Decl. Ex. A, Nov. 2022: 23-24, 28; Dec. 2022: 40, 42, 44, 67-68, 75.

22 ²⁸ *Id.* Jun. 2023: 1, 118, 151, 157.

23 ²⁹ Defendants' *Vaughn* index indicates that Defendants have also made these
 24 redactions pursuant to an unspecified regulation: "pursuant to (b)(6) and (b)(7)(C),
 25 these portions of the records are also withheld **in compliance with a DHS**
 26 **regulation** that requires this information be protected from disclosure." Hoq Dec.
 27 Ex. Y at 12 (#6) (emphasis added). To the extent that Defendants intend these
 28 references to indicate an independent basis for withholding, Defendants' reference
 to an unspecified statute or DHS regulation cannot satisfy their burden under FOIA.
Powell, 584 F. Supp. at 1512.

1 and 7(c) analysis to show any “non-trivial personal privacy interest.” *Yonemoto*, 686
2 F.3d at 694.

3 Even if the Court finds that the Defendants have asserted a non-trivial personal
4 privacy interest, the strong public policy interests in disclosure outweigh these
5 privacy interests. Although Defendants’ *Vaughn* index provides little clarity about
6 what type of information these redactions conceal, the relevance of this information
7 to important policy issues is apparent from the records themselves. DHS-OIG
8 investigators prepared these documents as they examined and distilled facts that they
9 believed were most important. That this redacted information appears repeatedly
10 throughout two DHS-OIG investigation reports demonstrates its importance.
11 Additionally, although Defendants provide no clarity as to what “immigration
12 history” information they have redacted, Hoq. Decl. Ex. Y at 9-11, such information
13 is likely relevant to the policy issues surrounding ICE’s determinations to release
14 Medina-Leon and Gulema before their deaths.

15 Further, where records at issue indicate potential “wrongdoing on the part of
16 the government official[s],” public interest in disclosure is particularly great. *Hunt*
17 *v. F.B.I.*, 972 F.2d 286, 289-90 (9th Cir. 1992). Here, one court has already found
18 that ICE’s practice of releasing people nearing death constituted an attempt to
19 “actively conceal” a death, raising “significant concerns regarding the Government’s
20 actions and lack of candor.” Order at 1, *Hernandez Roman*, No. CV-20-00768-TJH,
21 ECF No. 1031. These policy concerns outweigh any privacy interest in the redacted
22 information.

23 Defendants fail to offer any justification for these redactions, and the Court
24 should order them lifted. In the alternative, the Court should review these redactions
25 *in camera* to weigh the private and public interests for the release of this information.
26 5 U.S.C. §552(a)(4)(B).

C. Defendants Have Improperly Withheld Documents Referred by DHS-OIG to ICE.

DHS-OIG has also improperly withheld documents that it has referred to ICE, which the Court should order DHS-OIG to produce now. Although an agency in possession of potentially responsive FOIA records may refer them to the agency where they originated for processing, the referral constitutes an unlawful withholding if the “net effect is significantly to impair the requester’s ability to obtain the records or significantly to increase the amount of time he must wait to obtain them.” *Keys v. Dep’t of Homeland Sec.*, 570 F. Supp. 2d 59, 67 (D.D.C. 2008). The agency making the referral may only do so once it determines the originating agency had an “intent to control,” and the referral must be “prompt and public.” *McGehee v. C.I.A.*, 697 F.2d 1095, 1111 (D.C. Cir. 1983). Further, the referring agency continues to be “ultimately responsible for processing responsive records in its custody and control at the time of the FOIA request,” regardless of its referral of the documents to another agency. *Plunkett v. Dep’t of Just.*, 924 F. Supp. 2d 289, 305 (D.D.C. 2013).

Here, none of these criteria are met, such that DHS-OIG’s referral of documents to ICE constitutes an unlawful withholding. DHS-OIG informed Plaintiff of its anticipated referral of responsive records to ICE on August 18, 2022, but ignored Plaintiff’s request that it demonstrate that ICE had an intent to control the records before it made the referral. Hoq Decl. Ex. A at 2 (DHS-OIG’s Aug. 18, 2022 Letter). Between November 23, 2022 and July 31, 2023, DHS-OIG referred a total of 1,420 pages to ICE. Cho Decl. ¶¶ 5-13. On February 8, 2024, ICE informed Plaintiff that it had processed 583 of the 1,420 pages referred by DHS-OIG, producing 567 pages in part, and deeming 16 pages as nonresponsive. Hoq Decl. Exs. W and X (Defs.’ Jan. 31, 2024 Letter and Feb. 8, 2024 Email). In response to Plaintiff’s request that it produce these 16 pages, ICE conceded they were responsive to the Request, and agreed to produce them. Hoq Decl. Exs. Z, AA (Pl.’s Feb. 13,

1 2024 Letter, Defs.’ Feb. 21, 2024 Letter). However, ICE provided no timeframe for
 2 its production, and now claims that these 16 pages “are largely illegible.” Hoq Decl.
 3 Ex. AA. Defendants should not be permitted to avoid production of documents in
 4 legible form.³⁰

5 Plaintiff has requested production of the remaining 853 pages referred by
 6 DHS-OIG to ICE, which, to the best of Plaintiff’s knowledge, Defendants have not
 7 produced. Hoq Decl. Ex. Z (Pl.’s Feb. 13, 2024 Letter). Plaintiff has repeatedly asked
 8 Defendants to produce these referred records, or at least identify when they would do
 9 so. Hoq Decl. Exs. C, F, H, L, N, P, Z (Pl.’s Sept. 14, 2023, Oct. 19, 2023, Nov. 9,
 10 2023, Dec. 8, 2023, Dec. 13, 2023, Dec. 21, 2023, and Feb. 13, 2024 Letters).
 11 Defendants, however, have failed to provide clear information about the status of
 12 these documents. Hoq Decl. Exh. AA (Defs.’ Feb. 21, 2024 Letter). For example,
 13 several documents referred by DHS-OIG to ICE appear to be dated after October 1,
 14 2015 and relate to Mr. Gulema’s release. Cho Decl. Ex. A, Jun. 2023: 0145-46.
 15 Defendants have stated that all referred documents “will be produced by the agency
 16 that created the records, i.e. the agency to which OIG referred the records.” Hoq
 17 Decl. Ex. Q at 1 (Defs.’ Jan. 17, 2024 Letter). But ICE has also stated that with
 18 respect to documents related to Mr. Gulema, “[a]ll pages from October 1, 2015 and
 19 after have been processed.” Hoq Decl. Ex. S at 1 (Defs.’ Jan. 22, 2024 Letter).
 20 Plaintiff has repeatedly asked when these referred documents will be produced, but
 21 Defendants have declined to provide any clear response. Hoq Decl. Ex. T and V
 22 (Plaintiff’s Jan. 26 and Feb. 5, 2024 Letters; Defs.’ Feb. 21, 2024 Letter).

23 Given Defendants’ unjustified and prolonged withholding of the documents
 24 referred to ICE, the Court should order their expedited production by DHS-OIG. *Nat’l*

25 _____
 26 ³⁰ “Without question, a FOIA respondent has a duty to release legible, complete
 27 records.” *Cleary, Gottlieb, Steen & Hamilton v. Dep’t of Health & Hum. Servs.*, 844
 28 F. Supp. 770, 779–80 (D.D.C. 1993); *see also Grove v. Dep’t of Just.*, 802 F. Supp.
 506, 519 (D.D.C. 1992).

1 *Pub. Radio, Inc. v. U.S. Dep't of the Treasury*, No. CV-19-17(JDB), 2021 WL
 2 1850696, at *2 (D.D.C. Mar. 31, 2021). Agencies do not have “carte blanche to let
 3 the consultation process play out without any time restraints” and are “not absolved
 4 of [their] obligations under FOIA to timely produce the requested records solely
 5 because [they have] refer[red] the documents elsewhere for consultation.” *Id.*
 6 (internal quotations and citations omitted). Here, it has been a year and a half since
 7 DHS-OIG anticipated referring responsive records to ICE, and 16 months since it
 8 first informed Plaintiff it would be referring the first batch of records to ICE.³¹ Courts
 9 have ordered expedited production of referred records in similar circumstances. *Keys*,
 10 570 F.Supp.2d at 70 (one year delay); *Hall v. C.I.A.*, 668 F. Supp. 2d 172, 182
 11 (D.D.C. 2009) (two-year delay); *see also Truesdale v. U.S. Dep't of Just.*, 731 F.
 12 Supp. 2d 3, 7–8 (D.D.C. 2010) (denying government summary judgment where it
 13 failed to account for delayed processing of referred records). The Court should also
 14 order the production of these documents in legible form.

15 **D. DHS and DHS-OIG Failed to Adequately Search for Responsive**
 16 **Records.**

17 Records produced by DHS-OIG relating to DHS’s investigations into the death
 18 of Martin Vargas Arellano clearly show that DHS-OIG and DHS (including its
 19 component CRCL) failed to conduct an adequate search for records as required by
 20 FOIA. Where a FOIA requestor claims an agency has failed to adequately search for
 21 responsive records, “[t]he trial court must assess whether the Government has met its
 22 burden of demonstrating that its search was ‘reasonably calculated to uncover all
 23 relevant documents.’” *Transgender L. Ctr.* 46 F.4th at 779 (citation omitted).
 24 Agencies must demonstrate the adequacy of their search “beyond material doubt.”
 25 *Id.* Where agencies have “positive indications of overlooked materials,” they have a
 26

27 ³¹ See Cho Decl. ¶ 13 for summary of DHS-OIG’s referrals to ICE.
 28 *ACLU of Southern California v. U.S. ICE, et al.*, Case No. 2:22-CV-04760-SHK
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1 “duty to follow obvious leads” including searching other agency components for
2 responsive records. *Id.* (quotations and citations omitted).

3 At issue here are two documents produced by DHS-OIG in its June and August
4 2023 productions. First, DHS-OIG produced an April 5, 2021 letter sent to DHS
5 Secretary Alejandro Mayorkas, CRCL, and ICE by legal services providers
6 representing detained immigrants as part of the National Qualified Representative
7 Program (“NQRP”). Cho Decl. Ex. A, Aug. 2023: 4-11. The letter “demand[ed] that
8 your office holds ICE accountable for the death of [Martin Vargas Arellano],” and
9 asked that CRCL “initiate an investigation into [Mr. Vargas Arellano’s death].” *Id.*
10 at 0007. DHS-OIG produced this letter to Plaintiff after it consulted with the DHS
11 Privacy Office. Hoq Decl. Ex. D (Defs.’ Oct. 2, 2023 Letter). Second, DHS-OIG
12 produced a 4-page Case Summary Report indicating that DHS-OIG and other DHS
13 components had opened investigations related to the letter. Cho Decl. Ex. K. It
14 appears OIG “[o]pened” an inquiry into the matter on April 26, 2021, “Refer[red]”
15 the matter on June 30, 2021, and “Closed” the matter on July 27, 2021. *Id.* The Case
16 Summary Report also identifies three “Ref Case[.]” numbers related to the matter,
17 including “C21-ICE-DO-17226,” “Contact-DHS-21-2188,” and
18 “HLCN1618517941207.” *Id.*

19 Each of these references in these records provide “clear and certain” leads for
20 additional searches. *See Lawyers’ Comm. for C.R. Under L. v. U.S. Dep’t of Just.*,
21 No. 18-CV-167, 2020 WL 7319365, at *11 (D.D.C. Oct. 16, 2020). For example,
22 DHS-OIG should have searched for records, including email and other
23 correspondence, related to who referred the NQRP letter to DHS-OIG, how the letter
24 resulted in DHS-OIG opening a case in response to it, and where and why DHS-OIG
25 referred the matter out. DHS should have searched the components to which the
26 NQRP providers sent the letter, including CRCL. DHS-OIG and DHS should have
27 searched each of the case numbers referenced on the Case Report. By failing to

1 conduct additional searches based on these “clear leads,” Defendants have plainly
2 failed to meet FOIA’s search adequacy requirements.

3 Plaintiff repeatedly requested that Defendants DHS-OIG and DHS conduct
4 additional searches related to the NQRP letter. Hoq Decl. Exs. C, F, H, N (Pl.’s Sept.
5 14, 2023, Oct. 19, 2023, Nov. 9, 2023, Dec. 13, 2023 Letters). Defendants refused.
6 Hoq Decl. Exs. G, J (Defs.’ Nov. 2, 2023 and Nov. 30, 2023 Letters). DHS-OIG’s
7 Search Adequacy Letter is devoid of any explanation for why it refused to conduct
8 additional searches. Hoq Decl. Ex. R (Defs.’ Search Summary).

9 Defendants take the erroneous position that because Plaintiff originally
10 submitted its FOIA Request to the DHS Privacy Office, which determined that only
11 Defendants DHS-OIG and ICE would likely have responsive records, it now has no
12 further obligation to search other DHS components. Hoq Decl. Ex. J (Defs.’ Nov. 30,
13 2023 Letter). But this position is plainly wrong. According to DHS’s own FOIA
14 regulations, “[t]he Privacy Office will forward the request to the component(s) that
15 it determines to be most likely to maintain the records that are sought.” 6 C.F.R. §
16 5.3(a)(2). “[T]here is no indication [in the regulations] that the Privacy Office must
17 make that determination once and for all time when it makes its initial referral. *Am.*
18 *C.L. Union v. Dep’t of Homeland Sec.*, No. CV-20-3204-RDM, 2023 WL 2733721,
19 at *6 (D.D.C. Mar. 31, 2023); *see also Protect the Pub.’s Tr. v. U.S. Dep’t Homeland*
20 *Sec.*, No. 22-cv-138-JEB, 2022 WL 3226275, at *4 (D.D.C. Aug. 10, 2022). The
21 regulations also contemplate that if “a component’s FOIA office determines that a
22 request was misdirected within DHS, the receiving component’s FOIA office shall
23 route the request to the FOIA office of the proper component(s).” 6 C.F.R. § 5.4(c).
24 Even if the DHS FOIA Office did not initially believe components other than ICE
25 and DHS-OIG were likely to have responsive records, it became aware that it should
26 refer the Request to other DHS components including CRCL as early as August 2023,
27 when DHS-OIG consulted with the Privacy Office. Hoq Decl. Ex. D (Defs.’ Oct. 2,

2023 Letter). Defendants also became aware that DHS should refer the Request to CRCL when Plaintiffs specifically reminded it of its obligation to do so. Hoq Decl. Exs. C, F, H, N (Pl.’s Sept. 14, 2023, Oct. 19, 2023, Nov. 9, 2023, Dec. 13, 2023 Letters). Consequently, either through its Privacy Office or otherwise, DHS was “duty-bound to forward the request to [CRCL].” *Am. C.L. Union*, 2023 WL 2733721, at *6.

IV. CONCLUSION

For these reasons, Plaintiff’s Motion for Summary Judgment should be GRANTED.

The undersigned counsel of record for Plaintiff certifies that this brief contains 6,997 words, including footnotes and tables, which complies with the word limit of L.R. 11-6.1.

Respectfully submitted this 28th of February, 2024.

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